In the Supreme Court of the United States.

OCTOBER TERM, 1921.

LOUISIANA & PINE BLUFF RAILWAY COMPANY, appellant, v. UNITED STATES OF AMERICA, APPELLEE, and Interstate Commerce Commission, intervenor.	No. 291.

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION.

STATEMENT AND BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The appeal is from a final order or decree of the District Court dismissing the petition of appellant to enjoin the order of the Interstate Commerce Commission of June 10, 1919, fixing the switching allowances made by Missouri Pacific Railway, a trunk line, to appellant, a tap line, at Huttig, Arkansas.

Under the prior order of the Commission of July 29, 1914, fixing allowances for all tap lines (*O'Keefe, Receiver,* v. *United States,* 240 U. S. 294), appellant claimed 1.5 cents per 100 pounds from the trunk line for switching 3.25 miles in lieu of $3 per car for less than 3 miles. Part of the alleged 3.25 miles was created by an out-of-line or diverted back-haul in order to reach certain track scales maintained by the trunk line. Subsequently, February, 1915, the scales were moved and the out-of-line or diverted back-haul was increased for the further distance of 484 feet, which extended the entire movement to 3.42 miles (Tr. 9).

The Commission has persistently found against the tap line. (23 I. C. C. R. 277, 549, 583; 31 I. C. C. R. 490, 492; 34 I. C. C. R. 116; 40 I. C. C. R. 470; 53 I. C. C. R. 475; Tr. 28, 30.)

The District Court (Circuit Judge Stone and District Judges Trieber and Youmans all concurring), in a short opinion on the merits, followed *O'Keefe, Receiver,* v. *United States, supra,* and dismissed the petition on final decree, thus sustaining in all respects the order of the Commission (Tr. 45).

The tap line is owned by Union Saw Mill Company, which is subsidiary to and owned by The Frost-Johnson Lumber Company. The three companies are one in interest. The plant covers about 160 acres. The mill is at Huttig and is directly accessible to the trunk line. The lumber may be received by the latter directly from the mill. But that prac-

tice was not followed. Instead, the lumber was moved by the tap line to Dollar Junction (about 3 miles from the point where the scales formerly stood) and there delivered to the trunk line. At one time the trunk line allowed 5 cents per 100 pounds to the tap line on all cars. On May 14, 1912, the Commission filed its first report and found the arrangement "a mere device for the payment of allowances, which we hold to be unlawful." (The Tap Line Case, 23 I. C. C. R. 277, 549, 587.)

On July 29, 1914, after the decision in *The Tap Line cases*, 234 U. S. 1 (which did not include the Louisiana & Pine Bluff), the Commission struck off the order there condemned and entered the general order for all tap lines on the basis of a scale of distances with the following maxima, viz (*The Tap Line case*, 31 I. C. C. R. 490, 492): "For switching a distance of 1 mile or less from the junction, $2 per car; over 1 mile and up to 3 miles from the junction, $3 per car; on shipments from points over 3 miles and not more than 6 miles from the junction, 1½ cents per 100 pounds; over 6 miles and not more than 10 miles from the junction, 2 cents per 100 pounds; over 10 miles and not more than 20 miles from the junction, 2½ cents per 100 pounds; over 20 miles and not more than 30 miles from the junction, 3 cents per 100 pounds; over 30 miles and not more than 40 miles from the junction, 3½ cents per 100 pounds; over 40 miles from the junction, 4 cents per 100 pounds."

On January 10, 1915, the scales constructed and owned by the Iron Mountain (now Missouri Pacific)

and operated by a weighmaster under the supervision of the Western Weighing & Inspection Bureau were (Tr. 28) removed from the place "where the scales were located for several years" as "they had difficulty in keeping the water out of them" (Tr. 30). Their removal (for the distance of 484 feet) was completed some time the latter part of February, 1915 (Tr. 28). It is significant that when the Missouri Pacific moved the scales it did not select a location toward Dollar Junction, but in the opposite direction.

On July 5, 1916, the Commission specifically found that the out-of-line or diverted movement as increased by the removal of the scales may not properly be included under the order of July 29, 1914, when fixing the switching allowance or division that the tap line may receive from its trunk line connection. (*Louisiana & Pine Bluff Divisions*, 40 I. C. C. R. 470, 471.)

On rehearing, the Commission, on June 10, 1919, filed a supplemental report in which it further found: "* * * the track scales are on the main line of the Missouri Pacific and are owned and maintained by that road. It also appears that the movement of the cars from the Union Mill to the scales and for part of the distance from the scales to Dollar Junction is over the main line of the Missouri Pacific under a trackage arrangement. The evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line." (*Louisiana & Pine Bluff Divisions*, 53 I. C. C. R. 475, 476.)

On final hearing the District Court accepted the interpretation of the Commission of its own order. Seeing that the court had before it but mere fragments selected by appellant of the evidence before the Commission, and that the Commission had found on the *whole* record that (Tr. 45) "the evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line" (53 I. C. C. R. 475, 476), the District Court held that they could not review that finding. As no misapplication of law was shown, the bill was dismissed on final decree.

II.

BRIEF.

The petition alleges that the order of June 10, 1919, based on the order of July 29, 1914, deprives appellant of its property without due process of law, and is unjustly discriminatory and unduly prejudicial, in that appellant is denied compensation for the service of transporting its carload traffic of lumber and other forest products to and from the track scales at Huttig, while other railroad companies at other places are entitled to receive compensation for similar services under similar circumstances (Tr. 12).

The finding that "the evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line" may well be considered in connection with the fact that the Missouri Pacific owns the scales (Tr. 28), which are located on its own tracks at a point selected by it (Tr. 30) and are operated under the jurisdiction of

the Western Weighing and Inspection Bureau by an agent of that bureau who handles the scales (Tr. 29). Even in the mere fragments of the evidence selected and printed by appellant, there are indications that the Missouri Pacific is itself using the scales for weighing traffic not originating on the tap line. When appellant's witness was asked "Who owns the scale?" he answered, "Iron Mountain owns it, except it is joint" (Tr. 28). Certain traffic is "handled in over the Iron Mountain direct" (Tr. 29).

Concededly, then, the whole case reduces itself to the narrow arrangement that Missouri Pacific has simply turned over to the tap line the privilege of handling the cars in an out-of-line or diverted back-haul to the Missouri Pacific scales, which may be reached only over Missouri Pacific tracks, only under a trackage arrangement with the Missouri Pacific. The privilege is fully exercised by the mere operation of a switch engine by the tap line. All other facilities are furnished and all other service is performed by the Missouri Pacific. Without the out-of-line or diverted back-haul privilege to the tap line, the Missouri Pacific may not increase its divisions above $3 per car. This out-of-line or diverted back-haul was a part of the old arrangement under which the trunk line paid the tap line 5 cents per 100 pounds and which the Commission once condemned *in toto* (23 I. C. C. R. 277, 549, 583). Apparently, Missouri Pacific and appellant are united on the arrangement, as the former was not made a party to the petition and has never exercised its right to intervene. More-

over, appellant alleges that the trunk line stands ready and willing to pay on the basis of 1½ cents per 100 pounds (Tr. 12) for all cars moving prior to June 1, 1919, and 2 cents per 100 pounds for all cars moving subsequent to that date.

The appellant is driven to the extreme of arguing that the position persistently maintained by the Commission and sustained by the District Court should be overthrown by this court, holding that the order of July 29, 1914, fixing maxima allowances for switching should not be construed "as contemplating a direct haul from the loading point to the junction point without any diversion not made necessary to safely and properly reach such junction point" (Br. 13), but should also be extended to all diverted, out-of-line, back, and circuitous hauls. Protected by such a holding, the appellant tap line and the trunk line could then readily again move the scales for a farther distance away from Dollar Junction sufficient to enable the tap line to claim 4 cents per 100 pounds. There would doubtless also soon spring up a heavy demand for, and relocation of, track scales, and other facilities, throughout the whole of the tap line region.

That the Commission protected its order of July 29, 1914, against such contraptions is very clear from its language (40 I. C. C. R. 470, 471):

> In other words, the Pine Bluff, in order to bring about an increase in its earnings, claims to be entitled to compensation for an out-of-line haul to the scale track of nearly a mile. Were we to lend our approval to any such

> arrangement not only would the Pine Bluff be placed in a more advantageous position than any other tap line in this territory performing a similar service, but such a ruling would open the way in the case of many tap lines for a relocation of their track scales so as to require a long back haul, and in that way to lay a basis for divisions or allowances very materially in excess of those fixed by the Commission for the distance covered by a direct movement from the mill to the junction. Under the circumstances we can not lend our sanction to the demand for increased allowances to be paid to the Pine Bluff from the Union mill.

Counsel complain that "on the haul of the non-proprietary lumber from the Wisconsin Lumber Company's mill to the scale for weighing and thence to Dollar Junction for delivery to the Iron Mountain, the Commission fixed an allowance of 1½ cents per hundred pounds, as the haul was more than three miles. But on the proprietary lumber, although actually hauled more than three miles, the Commission declined to allow 1½ cents per hundred pounds, and allowed only $3 per car. The reason given by the Commission is that it can not include the distance hauled to and from the scales which when deducted left the haul at less than three miles" (Br. 19).

Counsel overlook that when the Commission, by its order of June 10, 1919 (Tr. 7), found that "the respective distances from the mill of the Union Saw Mill Company and from the mill of the Wisconsin Lumber Company at Huttig, Ark., to the connection

with the Missouri Pacific Railroad at Huttig, Ark., are less than 1 mile; that the distance from the mill of the Wisconsin Lumber Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., is 3.24 miles; and that the distance from the mill of the Union Saw Mill Company to the connection with the Missouri Pacific Railroad at Dollar Junction, Ark., is 2.41 miles," the Commission in each instance excluded the diverted or out-of-line back-haul to the scales. So excluding it, the distance from the Wisconsin Lumber Company mill to Dollar Junction is over 3 miles, and the distance from Union Saw Mill to Dollar Junction is less. Tracing the diagram, the distance from A to B is 1,563 feet, A to C, 2,748 feet, and A to F, 17,112 feet, or 3.24 miles; whereas, the distance from G to H is 855 feet, and G to F, 12,699 feet, or 2.41 miles.

Counsel emphasize that "The tap line record showed that of 103 tap lines under investigation, 20 weighed outbound lumber, and 13 had no scales available; as to the remaining 70 tap lines the record is silent. Your petitioner, therefore, is singled out from all other common carriers. An arbitrary ruling is applied without any justification whatever" (Br. 12). So, also, is the tap line record silent, nor does it otherwise appear, that in any other known case the scales were located and the weighing was conducted under the unique circumstances disclosed here.

Counsel argue that the decree of the District Court dismissing the petition was evidently based on the theory that the Commission "is better informed as

to the evil results which may follow from enjoining the order than is the court." (Br. 20.) The learned District Court did no more than cite the language of this court in *O'Keefe, Receiver*, v. *United States* (240 U. S. 294, 303), viz: "A tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others." (Tr. 45.) Of course that does not mean that the device was obvious to no one but the Commission. A more reasonable interpretation is that the District Court was politely pointing out that the device was obvious to all except counsel for the appellant.

Counsel rest on *Southern Pacific Co.* v. *Interstate Commerce Commission* (219 U. S. 433, 452). The substratum of that opinion is that the Commission was without power to disregard the question of the reasonableness of the rate and to proceed "upon the assumption that power was conferred upon it to fix an unreasonable rate because of its belief as to the equities of the situation or upon the basis of principles of estoppel or upon its conception of public policy and its right to enforce what was deemed best, under the circumstances, for the interest of shippers" (p. 441). If any question of the misapplication of the doctrine of equitable estoppel is presented by this record, the counsel for the appellant have not told us what it is.

In *Armour Packing Co.* v. *United States* (209 U. S. 56, 71), the language of this court is far more appropriate and under it the appellant's case must fall; viz:

> * * * it is made unlawful for any person or corporation to offer, grant, solicit, give, or to accept or receive any rebate, concession, or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported for a less rate than that published and filed by such carriers, or whereby any other advantage is given or discrimination practiced. And we find the word device disassociated from any such words as fraudulent conduct, scheme or contrivance, but the act seeks to reach all means and methods by which the unlawful preference of rebate, concession, or discrimination is offered, granted, given, or received. Had it been the intention of Congress to limit the obtaining of such preferences to fraudulent schemes or devices, or to those operating only by dishonest, underhanded methods, it would have been easy to have so provided in words that would be unmistakable in their meaning. A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance. Webster defines it to be "that which is devised or formed by design; a contrivance; an invention; a project," etc.

The decree of the District Court should be affirmed.

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OCTOBER 1, 1921.

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